IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.876 OF 2004

Prakash F.Trilokani and others).. Appellants

Versus

The Municipal Corporation of Greater Bombay and others).. Respondents

Mr.R.S.Apte with Mr.Neel G.Helekar for the Appellants.

Mr.J.Xavier for Respondent No.1.

Mr.A.C.Singh for Respondent Nos.2 and 3.

Mr.Vijay Kanodia for Respondent No.4.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 20TH DECEMBER 2004

P.C.:

. This Appeal From Order challenges the dismissal of Notice of Motion No.2635 of 2004 by the trial Court. The Appellants-original Plaintiffs, who are residents of building Nos.S-1, S-2 and S-3 in Sunder Nagar, claim in their Plaint that a certain plot of land which was adjacent to their buildings was used as an open space for the last 30 years and no building had been erected on that plot. They claim that this open space is being used by the residents of those buildings as a recreational ground. They have, therefore, challenged the construction sought to be put up by Respondent Nos.2

and 3-original Defendant Nos.2 and 3 of building No.S-5. The main challenge is on the basis that this open space is considered as a recreation ground in the Municipal records, according to the Plaintiffs. The Plaintiffs claim that whey they purchased the premises in the abovesaid buildings, they were informed that this was to be maintained as a recreation ground.

2. This matter was adjourned on several occasions only to ascertain whether in fact the sanctioned plans for S-1, S-2, S-3 and S-4 indicate that this open space is in fact depicted as a recreational ground in the records of the Municipal Corporation. The Plaintiffs sought to rely on a map drawn by their architect and annexed to the additional compilation filed by them at page 27 to buttress their case that this space was a recreational ground. The portion in the xerox copy of the plan which is coloured green is the portion which the Plaintiffs claim is a recreational ground. The words existing "Recreational Ground" have been endorsed on the green portion. Mr.Xavier for the Corporation, submitted that no such plan is available with the Municipal Corporation showing that this space was ever reserved as a recreational ground. When confronted with this, the learned Advocate for the Appellants, on instructions from the Appellants, stated that this plan was a sanctioned plan and had been obtained from the

Municipal Corporation. Therefore, on the last occasion, i.e. on 14th December 2004, this Court had directed the Appellants to file an affidavit placing on record the plan of 5th April 1983 showing the block plan of Shopping Centre and residential building on Plot Nos.21 and 22, CTS No.33/10, Sunder Nagar at S.V.Road, Chincholi, Malad (West), Mumbai, which the Appellants claimed was a sanctioned plan obtained by them from the records of the Corporation. I had further directed that the affidavit should mention as to when the Appellants had applied for the plan and a copy of the application for the plan as well as the Corporation's letter furnishing them the sanctioned plan should be annexed to the affidavit. Today an affidavit is filed of one I.K.Charolia, the Appellant No.2 stating that the plan which was referred was furnished to his predecessor-in-title by the partners of Respondent Nos.2 and 3. This affidavit also annexes a letter of the Advocate of the erstwhile occupant of the premises calling upon the Respondents not to violate the development plan. The Advocate has also called upon the Corporation not to approve the proposed building on the open land in front of the shop of the predecessor of I.K.Charolia in violation of the development plan. The tenor of the letter of the Advocate shows that this notice was issued because the access to the shops would be affected by constructing a building on the open land.

The affidavit is significantly silent on the stipulations contained in the order of this Court dated 14th December 2004. There is not a single averment in this affidavit stating whether an application had been made to the Corporation or that the Appellants had made an incorrect statement in Court.

3. A statement is made that a Chamber Summons is pending hearing before the trial Court. The Chamber Summons has been filed to amend the Plaint in order to challenge the sanctioned plan and certain other reliefs.

4. I have perused the sanctioned plan for the Sunder Nagar lay out which shows an area marked as "recreational ground". This lay out comprises of several plots including plot Nos.21 and 22 where buildings S-1 to S-4 have been constructed. S-5 is also being constructed on the same plot. Prima facie there is no need to maintain a separate recreation ground for each building when the recreational ground for the entire complex has been maintained according to the Development Control Regulations. Photographs are produced to show that a recreational ground already exists as depicted in the layout plan and is known as Sunder Nagar Udyan.

5. Mr.Xavier for the Corporation states that the

files in respect of buildings S-1, S-2, S-3 and S-4 are not traceable. He however produced for my perusal the original sanctioned plan for the proposed building S-5 of ground and four floors. An additional physical provision of a recreational ground of 5% is proposed in this plan. Therefore a part of the open space, which the Plaintiffs claim is a recreational ground, has been carved out as a recreational ground. A xerox copy of this original sanctioned plan is taken on record and marked "X" for identification.

6. In my view, the Plaintiffs have been continuously approbating and reprobating in the matter. Initially, the Plaintiffs claimed that there was an open space on which a construction of a building was to commence. Thereafter, the Plaintiffs stated that this open space was a recreational ground. The Plaintiffs went a step ahead and marked the open space on the xerox copy of the plan in green and endorsed the words "existing RG" on it. The Plaintiffs then produced a plan which they claimed initially was obtained from the Corporation. When confronted with the assertion of Mr.Xavier that no such plan existed on the records of the Corporation, the Plaintiff No.2 has filed an affidavit today in Court averring that the said plan was obtained from his predecessor in title. Obviously, the Plaintiffs are seeking to stall the construction of the

proposed building. When a recreational ground has already been maintained in accordance with the Sunder Nagar lay out plan, the question of leaving any additional open space as a recreational ground, prima facie, does not arise. In any event, the sanctioned plan of building S-5 indicates that 5% open space would be maintained as a recreational ground.

7. I see no reason to interfere with the order of the trial Court. However, it is made clear that the Respondents will not construct building S-5 except in accordance with law and the sanctioned plan. Mr.Singh, on instructions from his clients, states that the recreational ground as indicated in the plan marked "X" for identification will be maintained. Appeal dismissed.

8. In view of the Appeal From Order being disposed of, nothing survives in Civil Application No.1185 of 2004 and the same is disposed of accordingly.

9. Parties to act on an authenticated copy of this order.